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Supreme Court of the United States

OCTOBER TERM 1956

No. 818

TEAMSTERS, CHAUFFEURS, HELPERS & TAXICAB DRIVERS, LOCAL UNION NO. 327, *et al.*,
Petitioners,

v.

KERRIGAN IRON WORKS, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION

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Petitioners,

v.

KERRIGAN IRON WORKS, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee, Middle Section, entered in the above case on June 29, 1956.

OPINIONS BELOW

The opinion rendered by the Court of Appeals of Tennessee, Middle Section on June 29, 1956, is reported at *296 S. W. 2d 379*, and is printed in Appendix A hereto at pages 27-43.

A petition for certiorari to the Supreme Court of Tennessee was denied without opinion by the Supreme Court of Tennessee on December 7, 1956.

JURISDICTION

The jurisdiction of this Court rests upon *28 U. S. C., Sec. 1257(3)*. Petitioners, a labor union and its members, have been enjoined by a state court in Tennessee which lacks jurisdiction inasmuch as the comprehensive federal Labor Management Relations Act of 1947 (Taft-Hartley) has pre-empted this field of regulation and closed it to parallel state action.

The denial of certiorari by the Supreme Court of Tennessee made effective the decision of the Court of Appeals of Tennessee as the final judgment rendered by the highest court of Tennessee in which a decision could be had.

QUESTIONS PRESENTED

1. Does a state court have jurisdiction or power to enjoin union members engaged in driving common carrier motor vehicles in interstate commerce, and beneficiaries of a collective bargaining agreement permitting them to respect picket lines, from a "mere refusal to cross another's picket line (maintained to support a lawful strike) which conduct by the proviso of Section 8(b) [of the federal Labor Management Relations Act of 1947], is expressly declared not to be an 'unfair labor practice' "[1] on the sole ground that a refusal to cross such picket line interferes with duties imposed by state law on common carriers to serve all customers without discrimination,

(a) in view of those sections of the Labor Management Relations Act of 1947[2] protecting the right of employees

[1]The quotations here are from the statement of the case as framed by the Court of Appeals of Tennessee below. 206 S. W. 2d 379, 388. See Appendix *infra* at p. 40.

[2]Section 7, the proviso to Section 8(b), Section 13, Section 501(2) and Section 502.

to refuse to enter the premises of another employer whose employees are engaged in a lawful strike; or

(b) in view of those sections of the Interstate Commerce Act[3] making it unlawful for any common carrier motor vehicle to subject any person to any unjust discrimination, and giving the Interstate Commerce Commission exclusive and primary authority to determine whether any discrimination has been engaged in, and giving the federal district courts jurisdiction to enjoin such discriminatory activites upon application of the Interstate Commerce Commission?

2. Does a state court have jurisdiction or power to enjoin the use of or to declare illegal an agreement between a common carrier and a union representing its employees, under which such employees are permitted to respect picket lines without fear of discharge, under the circumstances and in view of the considerations set forth in Question 1 above?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is found in the Constitution of the United States, Article VI, second sentence, as follows:

> "This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

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[3] 49 U. S. C. A. §316(d), 316(e) and 322(b).

Pertinent statutory provisions which are printed in Appendix B, *infra*, p. 45 ff., are as follows: Pertinent portions of the Labor Management Relations Act of 1947, viz: *29 U. S. C., §157, 61 Stat. 140; 29 U. S. C., §158(b)(4), 61 Stat. 140; 29 U. S. C., §163, 61 Stat. 151;* §*501(2)* and *502* of the Labor-Management Relations Act of 1947, *61 Stat. 161, 162;* pertinent portions of the Interstate Commerce and Motor Carrier Acts, viz: *49 U. S. C., §316(d), 49 Stat. 558*, as amended, *54 Stat. 924; 49 U. S. C., §316(e), 49 Stat. 558*, as amended, *54 Stat. 924; 49 U. S. C., §322(b), 49 Stat. 564;* Tennessee statutes relating to common carriers: T. C. A., §§ 65-422, 65-512, 65-514, 65-1523, 65-1524; and Tennessee Anti-Trust Law, T. C. A., §69-101.

STATEMENT OF THE CASE

Petitioners are a labor organization and its individual officers and members. Respondent Kerrigan Iron Works, Inc. (hereinafter sometimes called Kerrigan), is engaged in the business of manufacturing iron and steel products in Nashville, Tennessee. Substantial interstate shipments of raw materials to, and finished products from, respondent's plants are customarily transported by Cook Truck Lines, Inc.; Hoover Motor Express Company, Inc. and other like interstate common carriers by motor vehicle.[4] These maintain "pick-up and delivery" services at respondent's Nashville plants. The carrier's employees are represented by petitioner, and are covered by a collective bar-

[4]The Interstate Commerce Commission has already asserted federal jurisdiction over these very interstate common carriers. See 10 FCC page 64, 59 MCC 415; 9 FCC 181, 58 MCC 421; 8 FCC 64, 52 MCC 806; 11 FCC 501, MC 78632 (Sub. No. 95); 10 FCC 486, MC 78632 (Sub. No. 67); 7 FCC 110, 49 MCC 929; 3 FCC 1[illegible], 37 MCC 507; 1 FCC Para. 7419, 27 MCC 719.

gaining agreement specifying wages, hours and working conditions which provides, *inter alia* that employees may not be required to go through a picket line or handle unfair goods. Specifically, the pertinent contract provision is:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods * * *." Art. IX, p. 14, Ex. A to Pritchard, tr., p. 148.

Respondent, Kerrigan became embroiled in a labor dispute with its employees who were members of and represented by a separate union also affiliated with A. F. of L., the International Association of Bridge, Structural and Ornamental Iron Workers (hereinafter called Iron Workers).[5]

Kerrigan's employees engaged in a strike approved by Iron Workers which is a "representative of such employees whom such employer is required to recognize under the proviso to Section 8(b)(4) of the federal Labor Management Relations Act.[6]

Iron Workers' pickets were placed at Kerrigan's plant entrances. Truck drivers, members of petitioner then exercised rights under their collective agreement set out above,

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[5]*Kerrigan Iron Works, Inc., 108 NLRB 933 (1954) at 940.* Unfair labor practice case wherein the Board asserts jurisdiction and points out that Ironworkers' local union is the certified bargaining representative.

[6]The pertinent federal statute is: 29 U. S. C. Sec. 158(b)(4):

> "* * * **Provided, That nothing contained in this subsection shall** be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; * * *."

and refused to cross the picket line or handle freight consigned to or from Kerrigan.

As a consequence, Kerrigan filed the instant suit in the Chancery Court of Davidson County, Tennessee against the common carrier motor freight lines, Cook and Hoover, which normally served the Kerrigan plants;[7] and against petitioner Local 327, its officers and members, both individually and in their representative capacity. The petition asserted that defendant common carriers and their employees were bound to render service to the public without preference or discrimination, and that their conduct in refusing to render their customary service to Kerrigan was in violation of the common laws and the statutes of 65-1523, 65-1524.) Reprinted at pp. 49-52, Appendix B. Further it was charged that petitioner, its officers and members had conspired and combined among themselves, and with defendant carriers, to accomplish the unlawful purpose of depriving Kerrigan of carrier service in violation of the Tennessee Anti-Trust Act. (T. C. A. 69-101), Reprinted at p. 52, Appendix B. Kerrigan's prayer was for injunction prohibiting petitioner and its members from interfering with Kerrigan's common carrier service, and requiring defendant carriers to provide service.

Defendants Cook and Hoover filed answers, each admitting its failure to render the service but averring that this was because its employees refused to cross the picket line

[7]During the course of the litigation other common carriers were made party defendants. Each of these was party to the same collective bargaining agreement as Cook and Hoover.

or to handle freight for complainant; and that each of them had a contract with Local 327 which permitted its employees to refuse to cross another union's picket line or to handle "unfair goods." Hoover also filed a cross-bill asking that this provision of the contract be declared illegal and void.

How Federal Question is Presented:

Petitioner, its officers and members, filed a plea to the jurisdiction of the Chancery Court, reprinted *infra* at Appendix D, p. 54, alleging that the subject matter of the suit was governed by the Federal statutes above cited, that the National Labor Relations Board had exclusive jurisdiction and the state court had no jurisdiction of the matter. (R., p. 22 ff.) The plea was overruled (R. 33) and temporary injunction issued as prayed, enjoining Local 327 and its officers and agents from interfering with any carrier or its employees in rendering such service.

Petitioner thereafter filed answer (R. 41-47; 124 ff.) averring that under the cited collective bargaining contact with the carriers, their members-employees of the carriers had a right to refuse to cross a union picket line or to handle "unfair goods," and that the relief sought would conflict with sections 7, 8 and 13 of the National Labor Relations Act.[8]

Further, petitioners moved to dissolve the temporary injunction and dismiss the suit on the ground that the court had no jurisdiction of the subject matter, and that

[8]29 U. S. C. §§157, 158, 163.

exclusive jurisdiction, by reason of federal pre-emption, was in the agency created by the federal statute. (R. 122.)

The cause was thereupon heard on the entire record, including the motion to dismiss for want of jurisdiction. The motion was overruled (R. 134; 204) and decree entered making the temporary injunction permanent and specifically enjoining petitioner, its agents, servants, etc. from interfering with the activities of the common carriers by "* * * inducing * * * any * * * common carrier or its employees, to fail or refuse or cease to furnish carrier service to or from (Kerrigan) or its places of business; and from hindering or interfering in any manner with the rendition of carrier service to or from (Kerrigan) or its places of business * * *" and "* * * from * * * inducing * * * any * * * carrier or its employees, to refuse to make or to breach or fail to perform any lawful contract between (Kerrigan) and such carrier, or between any such carrier and any shipper * * * directed to (Kerrigan) or its places of business." (R. 34, 204.)*

The effect of the injunction order was to require such of Local 327's members as were employed by common carriers to cross the valid picket line established at Kerrigan's premises by the Iron Workers. No distinction was made in the decree between common carriers subject to the Interstate Commerce Commission under the Interstate Com-

*The decree (R. 204), imported in full the prior temporary injunction, and specifically found the union's contract provision re observing picket line to be "legally ineffective." (R. 34.) Appendix C, *infra*, p. 55.

merce Act and carriers involved in purely intrastate operations, if indeed, there were any of the latter.[9]

Petitioner, its officers and members, after filing a motion to dissolve injunction which was denied by the trial court, R. 201-203, appealed to the Court of Appeals of Tennessee, Middle Section, at Nashville, asserting *inter alia* (R. 212 ff.) that the Chancery Court had no jurisdiction of the subject matter of the suit and that exclusive jurisdiction was in the federal agency; that the carrier's employees were exempted by their collective bargaining agreement, negotiated pursuant to the requirements of the federal law,[10] from any duty to render service at the picketed plants.

The Court of Appeals of Tennessee upheld and affirmed the decree of the trial court, holding that under both common and statutory law in Tennessee common carriers have an absolute duty to make deliveries without discrimination, which duty is interfered with when employees of such common carriers seek or attempt to respect otherwise lawful picket lines established at the premises of customers by other[11] unions. This duty, the Court found admitted of no exceptions because of Taft-Hartley, with which Act the

[9]All defendant carriers were engaged in interstate commerce and possessed certificates from the Interstate Commerce Commission empowering them to so operate.

[10]29 U. S. C. Sec. 158(a)(5) which makes it unlawful for an employer: "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

[11]The Court of Appeals of Tennessee sought to differentiate the instant situation where petitioner's members respected *another* union's picket lines, from that involved in this Court's reversal of the Kentucky Court which involved respect for the picket line of the member's own union. *General Drivers, etc. Union v. American Tobacco Co., 348 U. S. 978, 75 S. Ct. 569.* Thus the court noted *(296 S. W. 2d 379, 386)* "This right of union members to refuse to cross another union's picket line is, of course, not as important as their right to refuse to cross their own picket line." This is the only distinction between *American Tobacco* and the instant case. As we demonstrate *infra*, p. 14 ff., it is not significant.

court found no conflict. In this respect the Court stated as follows: *296 S. W. 2d 379 at 388, 389;* (Appendix, *infra*, p. 40).

> "So, we conclude that the conduct here enjoined was neither protected as a 'concerted activity' under sections 7 and 13 [of the Taft-Hartley Act] nor prohibited as an 'unfair labor practice' under section 8(b). * * *.
>
> "* * * So, it seems clear that the conduct here enjoined was not pre-empted by Congress and withdrawn from state power but that, since there was no federal remedy for such conduct, the state could afford its own remedy and the Chancery Court had jurisdiction of the subject matter of this suit."

Additionally, the court found that the agreement between petitioner Local 327 and various common carriers, permitting petitioner's members to respect picket lines, was invalid as an interference with the duty imposed by common law and state statute upon common carriers and their employees to make deliveries to all customers without discrimination. The court stated in this connection, *296 S. W. 2d 379 at 389* (Appendix, *infra*, p. 43).

> "Such a contract cannot excuse defendant carriers and their employees from performing their public duty of carriage."

These federal questions were next presented to the Supreme Court of Tennessee by timely petition for writ of certiorari (R. 261-285) which contained the assignment of errors challenging the jurisdiction and power of the state court and specifically posing the "Question Presented" as:

> "The facts in this cause are undisputed and present one question, 'Does the State Court have jurisdiction

or power "to compel by injunctive process" union members engaged in driving common carrier motor vehicles in interstate commerce and covered by a collective bargaining agreement permitting them to respect picket lines, "to cross a picket line advertising a lawful strike" conducted against another employer by members of another union, on the sole ground that a refusal to cross such picket line interferes with a duty imposed by state law on common carriers to deliver to all customers without discrimination?' "

Further, this petition posed the question as to the exclusive and primary authority of the Interstate Commerce Commission to determine whether any discrimination in carrier service is shown; viz. (R. 283):

> "In addition to the above the Interstate Commerce Act makes it unlawful for common carriers by motor vehicles engaged in interstate commerce, to subject any customer to unjust or unreasonable discrimination. [49 U. S. C. 316(b)]. It further provides, section 316(e) that the Interstate Commerce Commission shall, upon complaint of an unjust discrimination, make an investigation and a determination as to whether there is in fact any unjust, unreasonable or discriminatory practices engaged in. Section 322(b) provides for enforcement of orders or regulations of the Commission in this respect by injunctive process in the District Court of the United States upon application of the Commission. This Act was designed to achieve uniformity in the transportation system and to prevent imposition of conflicting duties and obligations by local regulation. By so doing, Congress has preempted the field (other than safety and highways) and has made either state courts or state administrative bodies powerless to act in such appeal."

As above indicated, the Supreme Court of Tennessee on December 7, 1956, denied the petition without opinion. (R. 292.)

Reasons for Granting the Writ

The judgment below is in direct conflict with the Court's *per curiam* opinion in *General Drivers, etc. v. American Tobacco Company, 348 U. S. 978.*

The state court has established various duties, under state law, of both interstate common carriers and their employees, which (1) are in direct conflict with and in deprivation of rights guaranteed by the federal Labor Management Relations Act of 1947 and encroach on the jurisdiction of the National Labor Relations Board; (2) impinge on the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act to establish such common carrier duties.

The interstate motor transportation industry, specifically singled out in Taft-Hartley for federal[12] control of its labor relations, views the prospect of 49 separate, and conflicting, controls of labor relations if the instant decision stands. And workers in this industry throughout the nation lose not only rights guaranteed by Sections 7, 13 and the proviso to 8(b)(4) of the federal Act, but are also effectively deprived of the right to bargain for and enjoy the benefit of "picket line" and "unfair goods" provisions in collective bargaining agreements. Such contract terms

[12]Section 10(a) of Taft-Hartley permits the NLRB to cede jurisdiction to a state in the transportation industry only in circumstances not here shown. The pertinent statutory provision is: 29 U. S. C. Sec. 160(a):

"* * * the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce * * *."

are traditional in the American labor scene,[13] and have been so recognized by this Court, which has noted that Section 8(b)(4)(B) of the Taft-Hartley Act "* * * clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree," *N. L. R. B. v. Rockaway News, 345 U. S. 71, 73 S. Ct. 519 (1953).*

The Bureau of Labor Statistics report on union agreements containing a "comprehensive collection of illustrations of the various provisions of written agreements between employers and employees in the United States"[14] notes with respect to "unfair goods" clauses:

> "Sympathetic support by members of one union for organized workers in other plants or in other trades and industries often finds expression in union agreements. Any union looks upon nonunion conditions of work as a threat to its own union working standards. Consequently it is often provided in agreements that the employer may not require employees to work on material coming from or destined for manufacturers not operating under union agreements. * * *."

The instant case thus presents issues of wide importance, involving the validity of traditional labor practices and conventional labor contract clauses. Moreover, the issues involve important questions of a state's regulation in conflict with and preemption by federal law.

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[13]See U. S. Department of Labor, Bureau of Labor Statistics bulletins on "trade agreements" (Bulletins 393, 419, 448 and 468) which record similar provisions in contracts of the following unions: Meat Cutters, Bakers, Stone Cutters, Plasterers, and Cement Workers, Hatters, Garment Workers, Bookbinders, Paper Cutters, Machinists, Fur Workers, Printers, Pressmen, Stereotypers, Teamsters, Photo-Engravers, Bus Drivers, Brewery Workers, Carpenters, Painters, and others. Cf. Encyclopaedia of the Social Sciences, *Boycott*, Vol. 2, p. 664.

[14]U. S. Department of Labor, Bureau of Labor Statistics, *Union Agreement Provisions*, Bulletin No. 686 (1942) Part VII. Compare Bulletin No. 908-13(1949) p. 37 ff.

1.

The action of the Tennessee Court is in direct conflict with this Court's *per curiam* reversal of the Kentucky Court in *General Drivers, etc. v. American Tobacco Company, 348 U. S. 978; 75 S. Ct. 569.*[15] There it was held that where interstate commerce is affected the issue of employee refusal to cross picket lines is within the jurisdiction of N. L. R. B. and closed to the States. The cases are indistinguishable; the only ground of distinction even suggested below being that "The right of union members to refuse to cross *another* union's picket line is, of course, not as important as their right to refuse to cross *their own* picket line" *(294 S. W. 2d at 386.* Emphasis added). This is a distinction without a difference. The right to refuse to break a picket line, whether of a worker's own union, or of some sister union, is a "concerted activity" protected by Section 7 of Taft-Hartley. Under the original Wagner Act it was an unfair labor practice for an employer to discharge an employee either for picketing or for refusing to cross a picket line.[16] The National Labor Relations Board and the courts have uniformly reached the same result

[15]The instant case likewise conflicts with *Garner v. Teamsters Union, 346 U. S. 485, 74 S. Ct. 161; Weber v. Anheuser-Busch, 348 U. S. 468, 75 S. Ct. 480; Local Union No. 25, etc. v. New York, New Haven, etc., 350 U. S. 155, 76 S. Ct. 227; Retail Clerks International Association etc. v. J. J. Newberry Company, ... U. S. ...., Docket No. 597, October Term, 1956, certiorari granted and judgment of Supreme Court of Idaho reversed,* per curiam, *January 28, 1957.*

[16]*Magnolia Petroleum Co., 12 L. R. R. M. 55; Cinch Mfg. Co., 91 N. L. R. B. 371; Montag Bros., Inc., 51 N. L. R. B. 366, enf'd 140 F. 2d 730 (C. A. 5); Columbia Pictures, Inc., 82 N. L. R. B. 568 (71); Illinois Bell Telephone Co., 80 N. L. R. B. 1171, set aside 189 F. 2d 124, 127-128, 129 (C. A. 7).*

under the amended Act,[17] except in the situation where the refusal to cross the picket line was deemed a violation of the employee's contract of employment.[18]

The Board's position, as to such conduct being protected by Section 7, is well illustrated by the following excerpt from the *amicus curiae* brief by the N. L. R. B. in the U. S. Supreme Court in *American Tobacco Company* case at pp. 21-23:

> "Moreover, the sympathetic action which petitioner Union sought to have the motor carrier employees engage in, far from being interdicted under the Act, is one of the forms of mutual assistance and concerted activity affirmatively protected by Section 7 thereof. Here, the picket line was established by the duly authorized bargaining representative of respondent's employees, and the Union invited action by the motor carrier employees only at respondent's premises, the situs of the primary dispute. Furthermore, unlike the situation in *Rockaway News*, the refusal of the carriers' employees to cross the line at respondent's factory was 'in obedience to any action by [their] union' (345 U. S. at 75); and, rather than constituting defiance of their employers' instructions, their refusal was specifically sanctioned by the contract between the carriers and the Union (*id.*, at 80).
>
> "In sum, in the situation here, Congress has concluded that a balance between the interests of employers, employees and the public is best achieved by leaving the carrier employees free to honor the picket line at respondent's premises, a result which would also be consistent with the contractual arrangement between the carriers and the Union. The state court, on the

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[17] *New York Telephone Co., 89 N. L. R. B. 383; J. A. Bentley Lumber Co. v. N. L. R. B., 180 F. 2d 641, 642, 643, N. 3 (C. A. 5) enforcing 83 N. L. R. B. 803, 816, 824; Standard Oil Co. of Calif., 91 N. L. R. B. 783, 787; Coal Creek Coal Co., 97 N. L. R. B. 14; West Coast Casket Co., 97 N. L. R. B. 820, enforced 205 F. 2d 902 (C. A. 9); Cyril de Cordova & Bro., 91 N. L. R. B. 1121, 1134-1139; Crowley's Milk Co., Inc., 102 N. L. R. B. 996, 997-998.*

[18] *N. L. R. B. v. Rockaway News, 345 U. S. 71, ... S. Ct. .....*

other hand, has obliterated this freedom and rejected the arrangement of the parties, thereby according a greater protection to the interests of the employer than Congress deemed appropriate in the circumstances presented."

See also *Cyril de Cordova, etc., 91 N. L. R. B. 1121, 1134-1139*, where the Board holds the refusal to cross the picket line was protected both by Section 7 and the proviso to Section 8(b)(4).[19] The Board gives effect to the proviso to Section 8(b)(4) of the amended federal Act which reads:

> "* * * Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; * * *."

In doing so, the Board construes the proviso as conferring a positive protection upon the right of an employee to refuse to cross a picket line.[20]

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[19]Compare Judge Hand's Opinion in *N. L. R. B. v. Peter-Cailler-Kohler Swiss Chocolate Co., 130 F. 2d 503, 505*, reaching similar result under the earlier federal Act.

[20]The Board holds *(91 N. L. R. B. at 1137)*:

> "The proviso clearly reflects that Congress recognized the traditional reluctance of employees to cross picket lines, and—under the particular conditions described in the proviso and present also in this case—regarded an employee's refusal to cross a picket line as a form of conduct not unjustifiable from the point of view of public policy. And this is so, no matter how the proviso in its relationship to Section 8(b)(4) is interpreted. If, as has been contended, the proviso is to be interpreted not as qualifying the provision of Section 8(b)(4), but as a general reaffirmation of individual rights, the conclusion that Congress intended to retain within the protection of the Act conduct such as was engaged in by Finn would appear to follow as a matter of course. If, as it believed, Congress intended the proviso to engraft an exception on 8(b)(4), applicable to union unfair labor practices, the same result would follow. For obviously it would be absurd to say that a union may lawfully induce or encourage employees to refuse to cross a picket line under the circumstances described in the proviso, and yet simultaneously say that employees who refuse to cross are subject to forfeiture of their rights under the Act."

Indeed, the court below acknowledged that: "This right to refuse to cross another union's picket line has been a potent weapon in Labor's fight for the gains it has made * * *." *296 S. W. 2d at 386.* Yet since, in the court's view, "this right is not as important as their right to cross their own picket line," and since as the lower court viewed it, the union's conduct "does not involve * * * any of the other vital rights of workers, it would seem not to be a concerted activity within the protection of Section 7." (Appendix A, p. 27 at 36 ff.)

We respectfully assert that an acknowledged traditional concerted activity, specifically protected by Section 7 as held in numerous N. L. R. B. and federal court decisions, may not be impaired by a state tribunal because in the state court's view it is comparatively "not * * * important," or does not involve what the state court considers to be "vital" rights.

The state court has enjoined the exercise of rights guaranteed and protected under the Labor-Management Relations Act of 1947. The right of union members, individually or concertedly, to observe a picket line is expressly recognized under the proviso of Section 8(b) and under the general right given all employees under Section 7 of the Act "to assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." If this federally protected right can be enjoined in the state courts under a theory that interstate carriers have an absolute duty under state law to deliver goods to any and all customers

regardless of whether any particular customer may be involved in a lawful strike, then an easy method for the avoidance of federal rights has been discovered. This Court, in *Hill v. Florida, 325 U. S. 538*, has made clear that in such cases of head-on conflict between rights protected under the federal law and duties prescribed by the state, the federal law must prevail. See also *Allen-Bradley v. N. L. R. B., 315 U. S. 740; Garner v. Teamsters, etc., 346 U. S. 485; Weber v. Anheuser Busch, 348 U. S. 468; Retail Clerks, etc. v. J. J. Newberry, ... U. S. .....*, Docket No. 597, October Term 1956, certiorari granted and judgment of Supreme Court of Idaho reversed *per curiam*, January 27, 1957.

It is to be noted that the right to respect picket lines is, under the state law, flatly and in all circumstances denied, that is, without relation to any unlawful object such as might have been the case had the right been exercised in connection with an unlawfully established picket line or in aid of an unlawful strike. This being so, the argument that the common carrier "duty" established under state law is akin to the various duties imposed by the states upon public utilities is unavailing. In *Amalgamated Association v. Wisconsin Board, 340 U. S. 383*, this Court held that a general proscription on the right of employees of public utilities to strike under any and all circumstances was in conflict with the paramount federal law establishing such right generally. "Creation of a special classification for public utilities is for Congress, not for this

Court";[21] and this is equally true if the utility be a common carrier.

Even if the conduct here were not protected by Sections 7, 13 and the proviso to 8(b)(4) of the Federal Act, the state court still could not intrude. For exclusive control of secondary boycotts insofar as interstate commerce is involved is lodged in N. L. R. B. by Section 8(b)(4) of the federal Act.[22] Here, as in *Garner*, it is apparent that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatable or conflicting adjudication as are different rules of substantive law." *346 U. S. 485, 491.*

Accordingly, regardless of the ultimate basis for the Tennessee Court decision, and regardless of whether N. L. R. B. would have reached the same result, since the Tennessee Courts have intruded into the domain of labor managament relations which are the subject of federal legislation, the judgment is void under the provisions of Article I, Section 8, and Article VI of the federal constitution.

2.

In any event and regardless of any question of the paramountcy of federal law protecting the right of employees to respect picket lines, it would appear clear that the state court was lacking in jurisdiction and power to attempt to adjudicate, in respect to motor carriers sub-

[21] *Amalgamated Association v. Wisconsin Board*, supra, at 392.

[22] For N. L. R. B. determination under 8(b)(4) allegations similar to those here in issue, see *General Drivers, etc., et al., and American Iron Machine Works, 115 N. L. R. B. 800, pending on review (U. S. C. A., D. C.), sub nom. General Drivers, etc. v. N. L. R. B., No. 13,394.*

ject to the Interstate Commerce Act, the question of whether there exists some species of duty by state law under which such carriers are bound to make deliveries to any and all customers regardless of any strike circumstances that might be involved. The Interstate Commerce Act makes it unlawful for common carriers by motor vehicle, engaged in interstate commerce, to subject any customer to unjust or unreasonable discrimination [49 U. S. C. 316(d)]. It further provides [Sec. 316(e)] that the Interstate Commerce Commission shall, upon complaint of an unjust discrimination, make an investigation and a determination as to whether there is in fact any unjust, unreasonable, or discriminatory practices engaged in. Section 322(b) then provides for enforcement of orders or regulations of the Commission in this respect by injunctive process in the district courts of the United States upon application of the Commission. A long line of cases[23] has established the principle that the Interstate Commerce Act represents a comprehensive effort on the part of the federal government to control in all ways and manners the transportation of goods in interstate commerce, to define the duties and obligations of motor carriers engaged in such transportation, and to set up procedures for investigation and determination of alleged violations of their obligations and duties as common car-

[23] *Armour & Co. v. Alton R.R. Co., 312 U. S. 195; Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co., 230 U. S. 247; B. & O. Railroad Co. v. U. S., ex rel Pilcum Coal Co., 215 U. S. 481; Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation Dist., 304 U. S. 295; T. & P. Railway v. American Tie & Timber Co., 234 U. S. 138; Great Northern Ry. Co. v. Merchant's Elevator Co., 259 U. S. 285; Terminal Warehouse Co. v. Pennsylvania Railway Company, 297 U. S. 500.*

riers. The Act was designed to achieve uniformity in the transportation system and to prevent imposition of conflicting duties and obligations by local regulation. By so doing, Congress has pre-empted the field (other than safety of highways) and has made either state courts or state administrative bodies powerless to act in such field. In *Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43*, and *Great Northern v. Merchants Elevator Co., 259 U. S. 285*, this Court made clear that resort to the Interstate Commerce Commission for determination of the administrative question of the discriminatory or unreasonable nature of a carrier's failure or refusal to provide service was an absolute condition precedent to any action being taken in respect to any such alleged discriminatory practices by any other tribunal. See also *Terminal Warehouse Co. v. Pennsylvania R. R. Co., 297 U. S. 500.*[24] The Congress having taken in hand the particular subject matter of the question of the reasonableness of an interstate motor carrier to refuse or fail to make deliveries into a strike-bound plant, state laws respecting that same matter must fall. *Charleston & Carolina R. R. v. Varnville Co., 237 U. S. 597; Missouri Pacific R. Co. v. Porter, 273 U. S. 341.*

3.

A final important question of federal law determined by the court below and in conflict with applicable decisions

[24]Incidentally, the federal rule is that refusal to deliver because of the existence of a labor dispute is sufficient reason to make the carrier's refusal or failure to deliver a reasonable and non-discriminatory one. See *"The Plight of a Strike-Bound Carrier," Charles H. Woods, Minnesota Law Review, February, 1949, pp. 255-282; Montgomery Ward & Co. v. Chicago M. S. P. & P. Railway, 268 I. C. C. 257; Consolidated Freightways, 42 M. C. C. 225.*

of this Court is involved in its holding, incidental to its determinations discussed in Points 1 and 2 above, that an agreement duly entered into between various of common carriers and the local union herein, under which such members were accorded the right to respect picket lines without fear of discharge or other retaliation, was invalid and unenforceable. This Court, in the *Rockaway News* case, *supra*, and the Second Circuit in *Rabouin v. N. L. R. B., 195 F. 2d 906*, have specifically upheld the validity of such agreements under the Labor-Management Relations Act of 1947, as has the Eighth Circuit in *Meier & Pohlman Furniture Co. v. Gibbons, 233 F. 2d 296, cert. den., October 1956, ... U. S. ....., 77 S. Ct. 101.* In *Rockaway* this Court stated in this respect that the proviso to Section 8(b) above referred to "clearly enables the contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree." Accordingly, the legal considerations applicable in Points 1 and 2 above are relevant here, and it would appear that the Court of Appeals of Tennessee is clearly in error in holding that the state law respecting the alleged duties of common carriers to maintain deliveries in spite of strike difficulties of particular customers supersedes the rights of union and employers subject to the federal labor act to enter into the agreements in question. Such clauses are an important subject matter of collective bargaining and are found in numerous agreements of various labor organizations throughout the country. It cannot be assumed, absent express indication of Congressional intent [see e. g., Section 14(b)], that Congress left to the states jurisdiction to

legislate concerning that particular aspect of collective bargaining.

In any event, jurisdiction to determine the legality of such agreements would appear to be solely within the province of the National Labor Relations Board or of the federal courts seeking, upon application of the Board, to enjoin practices alleged to be in violation of Section 8(b)(4). See *Rabouin, d. b. a. Conway's Express, 87 N. L. R. B. 972; Pittsburgh Plate Glass Co., 105 N. L. R. B. 120; Garner, et al. v. Teamsters Local Union 776, 346 U. S. 485; Building Trades Council, et al. v. Kinard Construction Co., 346 U. S. 933; N. L. R. B. v. Parran, 237 F. 2d 373 at 375 (C. A. 4, 1956).*

CONCLUSION

For the foregoing reasons it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

By .....

Dated: March 4, 1957.

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CERTIFICATE OF SERVICE

I, L. N. D. Wells, Jr., one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States hereby certify that copies of the foregoing Petition for Certiorari and Appendices were this day served on adverse parties herein in accordance with Supreme Court Rules 21(1) and 33 by depositing the same in the U. S. Post Office at Dallas, Texas, with first class air mail postage prepaid addressed to counsel of record at his post office address, as follows:

Bass, Berry & Sims, 1000 American Trust Bldg., Nashville 3, Tennessee, Attorneys for Kerrigan Iron Works, Inc.; Judson Harwood, Nashville Trust Bldg., Nashville, Tennessee, Attorney for Hoover Motor Express Company, Inc.; Charles Hudson, Jr., Broadway National Bank Bldg., Nashville, Tennessee, Attorney for Cook Truck Lines, Inc.; Waller, Davis & Lansden, 12th Floor, American Trust Bldg., Nashville 3, Tennessee, Attorneys for Super Service Motor Freight Co.; Stokes & Trimble, 537 Third National Bank Bldg., Nashville 3, Tennessee, Attorneys for Mohawk Motor Lines, Inc.; Cate & Cate, 510 Stahlman Bldg., Nashville 3, Tennessee, Attorneys for Johnson Freight Lines, Inc., Silver Fleet Motor Express, Inc., Wilson Truck Company; James C. Havron, Stahlman Building, Nashville 3, Tennessee, Attorney for Pulaski Highway Express, Inc.; Howard, Davis, Boult & Hunt, 7th Floor, American Trust Bldg., Nashville 3, Tennessee.

L. N. D. WELLS, JR.

APPENDICES

APPENDIX A

KERRIGAN IRON WORKS, INC.,

v.

COOK TRUCK LINES, INC., *et al.*,

Court of Appeals of Tennessee

Middle Section

June 29, 1956

FELTS, Judge.

This is a suit by a shipper for an injunction to require common carriers to continue rendering their customary service to complainant, and to restrain a labor union and its officers and agents from interfering with any carrier or its employees in rendering such service.

The original bill was filed November 26, 1952, in the Chancery Court of Davidson County at Nashville, by complainant Kerrigan Iron Works, Inc., against Cook Truck Lines, Inc.; Hoover Motor Express Company, Inc.; Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327 (hereinafter referred to as Local 327); and its officers and agents, sued both as individuals and as representatives of Local 327, an unincorporated association.

Defendants Cook and Hoover were Tennessee corporations and common carriers engaged in transporting freight for hire by motor truck on the highways in this and in other states, under certificates of convenience and necessity issued by the Interstate Commerce Commission and by the Tennessee Public Service Commission. Defendant Local 327 was the union and the collective-bargaining representative of the truck driver and freight-handling employees

of Cook, Hoover, and other motor truck carriers with their principal place of business in Nashville.

Complainant had two plants in Nashville where it manufactured iron and steel products. It shipped large amounts of raw materials to these plants and large quantities of its manufactured products from them. Such shipments were intra- and interstate and were customarily carried by Cook, Hoover, and other like carriers, which maintained pickup and delivery service at these plants. Complainant was largely dependent on such service for continuance of its business.

None of complainant's employees were members of Local 327. Some of them were members of another and different union, the International Association of Bridge, Structural, and Ornamental Iron Workers (hereinafter called Iron Workers), and were covered by a collective bargaining contract between complainant and Iron Workers. In March 1952, a dispute arose, Iron Workers called a strike, and placed pickets at complainant's plants. Some weeks later most of the employees came back to work, and complainant has been operating the plants ever since, though Iron Workers has continued the picketing, which has been peaceful.

When Iron Workers put the pickets at complainant's plants, defendants Cook and Hoover quit rendering carrier service to complainant. They refused to make pickups or deliveries at the plants and refused to permit complainant's employees to come to their freight yards for freight which had been consigned to complainant and accepted by them for delivery to it. They stated that the reason for their refusal was that their employees, members of Local 327, would not cross Iron Workers' picket line or handle freight consigned to or from complainant's plants.

The bill averred that this reason was wholly insufficient; that under the law of Tennessee defendant common carriers and their employees were bound to render service to the public without preference or discrimination; and

that their conduct in refusing to render their customary service to complainant was in violation of the common law and statutes of Tennessee, T.C.A. §§ 65-422, 65-512, 65-514, 65-1523, 65-1524.

It was further charged that the officers, agents, and members of Local 327 had conspired and combined among themselves and with defendants Cook and Hoover to accomplish an unlawful purpose, to wit: refusal to perform or permit performance of the legal duty upon these common carriers to render their customary service to complainant; and that this combination was in violation of the Tennessee Anti-trust law, T.C.A. § 69-101.

The bill further charged that defendant carriers had accepted from other common carriers freight consigned to complainant and had thereby entered into contracts to complete the carriage and deliver the freight to complainant; and that the conduct of Local 327 and its members, in causing defendant carriers to breach such contracts, violated the statute of Tennessee declaring it unlawful for any person, by any means, to procure a breach of any lawful contract by any party thereto, T.C.A. § 47-1706.

The bill also alleged that by reason of defendants' unlawful conduct, complainant would suffer irreparable damages, and that there was no adequate remedy at law. The prayer was for a temporary injunction restraining defendant carriers from failing or refusing to provide their customary service to complainant, and restraining Local 327 and its officers and agents from interfering with such service; and that, on final hearing, such injunction be made permanent.

Defendants Cook and Hoover filed answers, each admitting its failure to render the service but averring that this was because its employees refused to cross the picket line or to handle freight for complainant; and that each of them had a contract with Local 327 which permitted its employees to refuse to cross another union' picket line or

to handle "unfair goods." Hoover also filed a cross-bill asking that this provision of the contract be declared illegal and void.

On December 17, 1952, defendant Local 327 and its officers and agents filed a plea to the jurisdiction of the Chancery Court. They alleged that the subject matter of this suit was governed by sections 7 and 8(b)(4)(A) and (D) of the National Labor Relations Act, as amended, 29 U.S.C.A. §§ 157, 158(b)(4)(A, D); and that the National Labor Relations Board had exclusive jurisdiction and the state court had no jurisdiction in the matter.

On January 12, 1953, after a hearing, the Chancellor entered a decree overruling this plea and granting a temporary injunction, as prayed, enjoining Cook and Hoover "from failing or refusing, while exercising the duties and privileges of a common carrier, to provide the customary carrier service to complainant * * *" and enjoining Local 327 and its officers and agents from interfering with any carrier or its employees in rendering such service.

Local 327 and its officers and agents filed an answer averring that under the contract with the carriers their employees had a right to refuse to cross a union picket line or to handle "unfair goods"; and that the relief sought by the bill would conflict with sections 7, 8, and 13 of the National Labor Relations Act, as amended, and would deprive the union and its members of their rights under the 13th and 14th Amendments to the Constitution of the United States.

By supplemental bill, 20 more motor carriers, with the business agent of Local 327 with each of them, were made defendants. Answers were filed by some and *pro confessos* entered against the others. Proof was taken by complainant and by cross-complainant Hoover. No proof was offered by Local 327 or its officers or agents. Instead, they moved to dissolve the injunction and dismiss the suit on the ground

that the court had no jurisdiction of the subject matter, and that exclusive jurisdiction was in the National Labor Relations Board.

On June 28, 1955, the cause was finally heard before the Chancellor on the entire record, including the motion to dismiss for want of jurisdiction. He overruled the motion and entered a decree finding the facts as alleged in the bill, making the temporary injunction permanent, and continuing it in force pending an appeal.

Local 327 and its officers and agents appealed and insist that the Chancery Court had no jurisdiction of the subject matter of the suit; that the carriers' employees were exempted by their contract for any duty to render service at the picketed plants; and that the injunction violates appellants' rights under the 13th and 14th Amendments to the Constitution of the United States.

The subject matter of the suit is the controversy between the shipper and the carriers. It does not involve any employer-employee relation or any labor dispute. It does not involve the dispute between complainant and its employees or seek to stop their picketing. The only conduct complained of is the conduct of the carriers in not rendering the service and the conduct of appellants in interfering to prevent such service.

[1] That this conduct is unlawful cannot be denied. It violates the common law and the statutes of Tennessee, as averred in the bill and above set forth. Under the rule in equity and under our statute, T.C.A. § 65-1523, complainant shipper is entitled to an injunction to compel the carriers to render the service, and to restrain appellants from interfering therewith. T.C.A. §§ 65-1523, 65-1524; Gibson's Suits in Chancery, 4th Ed., sec. 804; Hogan v. Nashville Interurban Railway Co., 131 Tenn. 244, 174 S.W. 1118, L.R.A.1915E, 788, Ann.Cas.1916C, 1162; Memphis News Publishing Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S.W. 941, 63 L.R.A. 150.

[2] Such is the general rule of equity in state and federal courts. A shipper is entitled to an injunction to require a common carrier to perform its duty of carriage; and, according to equity practice, the injunction runs against the carriers' "agents and employees", as of course and without their being made parties to the suit. 2 Daniell's Chancery Pleading and Practice, 6th Am.Ed., 1673; Gibson's Suits in Chancery, 3d Ed., sec. 834; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., C.C., 54 F. 730, 742, 19 L.R.A. 387, 393; Montgomery Ward & Co. v. Northern Pacific Terminal Co., D.C.1953, 128 F.Supp. 475-519, same, D.C., 128 F.Supp. 520-527; Burlington Transportation Co. v. Hathaway, 234 Iowa 135, 12 N.W.2d 167, 149 A.L.R. 1238.

> "An injunction not only binds parties defendant but also those identified with them in interest or subject to their control, and may issue against and be binding on the agents and employees of a party without the agents and representatives being made parties to the suit. In re Lennon, 166 U.S. 548, 17 S.Ct. 658, 41 L.Ed. 1110; Chase National Bank v. [City of] Norwalk, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894; and Rule 65(d), Federal Rules of Civil Procedure, 28 U.S.C.A." Baltimore & O. R. Co. v. Chicago River & Indiana R. Co., 7 Cir., 170 F.2d 654, 659, certiorari denied Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 336 U. S. 944, 69 S. Ct. 811, 93 L. Ed. 1101.

[3] So long as a person remains an employee of a carrier he is identified in interest with the carrier and is subject to the same duty which the carrier owes to the public and to the shipper. "The transportation employee, rail or motor, is charged with duties to the industry, to the shipper and to the public". Judge Fee, Montgomery Ward & Co. v. Northern Pacific Terminal Co., supra, 128 F. Supp. 500; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., supra, 54 F. 743, 19 L.R.A. 394.

[4] This general rule that state courts may grant injunctive relief against carriers applies not only to intra- but also to interstate carriers. As to the former, this equity jurisdiction of Chancery Courts in this state was not superseded by our statutes relating to the Tennessee Public Service Commission, but was supplemented by one of these provisions, T.C.A. § 65-1523. Nor was such jurisdiction as to interstate commerce superseded by the Interstate Commerce Act and its amendments. 49 U.S.C.A. §22; Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U.S. 120, 124, 37 S.Ct. 46, 61 L. Ed. 188; Montgomery Ward & Co. v. Northern Pacific Terminal Co., D.C., 128 F.Supp.475, 494-495.

Appellants, however, deny that such jurisdiction exists in this case. As we understand, they do not deny that their conduct, in preventing the carriers' employees from rendering the service, violated the law of this state. They undertake to justify such conduct upon the claim that these employees, under their contract[1] with the carriers, had the right to refuse to cross another union's picket line or to handle "unfair goods", and that their conduct has been, by the federal Acts, 29 U.S.C.A. § 141 et seq., withdrawn from state power and placed in the exclusive jurisdiction of the National Labor Relations Board.

Their argument is that the conduct here enjoined was either a "concerted activity" protected by section 7[2] and section 13[3] of the Wagner and the Taft-Hartley Acts, 29

[1]The contract provision relied on is as follows: "It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods * * * (defining the term "unfair goods") * * *." Art. IX, p. 14, Ex. A to Pritchard, tr. p. 143.

[2]Section 7 is as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *."

[3]Section 13 is as follows: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

U.S.C.A. §§ 157, 163, or a union "unfair labor practice" under section 8[4] (b)(4)(A,D) of that Act, 29 U.S.C.A. § 158(b)(4)(A,D), of which the exclusive jurisdiction was in the National Labor Relations Board; and that in either event, the state court had no jurisdiction to enjoin such conduct.

Thus by section 7 employees have the right to join or assist labor unions, and to engage in other "concerted activities" for collective bargaining or other mutual aid or protection; while section 13 provides that nothing in the Act, except as therein provided, shall be construed to interfere with "the right to strike"; and section 8(b) outlaws and defines certain union conduct as "unfair labor practices".

These provisions are cast in most general terms, and the Supreme Court warns that this law "leaves much to the states, though Congress has refrained from telling us how much", Garner v. Teamsters, C. & H. Local Union, 346 U.S. 485, 488, 74 S.Ct. 161, 164, 98 L.Ed. 228, 238; and that "'the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not

[4]This part of section 8 is as follows: "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter."

susceptible of delimitation by fixed metes and bounds' * * * What is within exclusive federal authority may first have to be determined by this Court to be so". Amalgamated C. W. of A. v. Richman Bros., 348 U.S. 511, 516, 75 S.Ct. 452, 455, 99 L.Ed. 600, 608.

[5-7] Nevertheless, we think a state court, confronted with this problem, may safely deduce from the Supreme Court decisions these three generalizations, as useful aids in the consideration of the question:

1. When a suit upon a matter of labor relation is brought in a state court and the court's jurisdiction is denied, the court must determine the question for itself. It is true there is language in some of the cases to the effect that a state court has no authority to determine a question of unfair labor practice under the federal Acts and that it must be determined by the National Labor Relations Board. But it is of the essence of judicial duty that the court must decide the case, including the question of its own jurisdiction. It cannot stop and refer the question to the Board; nor will a federal court interfere to forestall the state court's determination. Amalgamated C. & W. of A. v. Richman Bros., supra. There, Mr. Justice Frankfurter, speaking for the Court, said:

> "We cannot assume that this confidence [in state courts] has been misplaced. Neither the course of this case, nor the history of state court actions since the decision in Garner v. Teamsters, C. & H. Local Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, demonstrate recalcitrance on the part of state courts to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems". 348 U.S. 518, 75 S.Ct. 452, 457, 99 L.Ed. 609.

2. Matters of local concern, such as labor relations, over which the several states have traditionally exercised jurisdiction, remain in state power unless and until they are preempted by Congress, by virtue of the Commerce, art. 1,

§ 8, cl. 3, and the Supremacy, art. 6, cl. 2, clauses of the federal constitution; and in a given case the intent of Congress to exclude state power must be clearly manifested. International Union U. A. W. A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 253, 69 S.Ct. 516, 93 L.Ed. 651, 662; Allen-Bradley Local No. 1111, U. E. R. M. W. v. Wisconsin Employment Relations Board, 315 U.S. 740, 749, 750, 62 S.Ct. 820, 86 L.Ed. 1154, 1164; Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 9, 58 S.Ct. 87, 82 L.Ed. 3-10.

3. In order to exclude state power over a given type of conduct in labor relations, two things must concur: (1) Congress must clearly have manifested an intent to preempt such conduct and withdraw it from state control; and (2) it must have provided a federal remedy for injury caused by such conduct. In the absence of such remedy, such conduct will be subject to concurrent jurisdiction of both the state's and the federal authority. United Constr. Workers, etc. v. Laburnum Constr. Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025; United Auto., A. & A., etc. v. Wisconsin Employment Relations Board, 351 U.S. 266, 76 S.Ct. 794, 100 L.Ed. —, and other cases hereinafter cited.

We come to the question whether the union conduct here is a "concerted activity" under sections 7 and 13 so as to be protected from state power. This case does not involve any employer-employee relation or any labor dispute between the parties. The only conduct involved is the refusal of the carriers and the employees to render the service and the only union claim is that of the right of its members to refuse to cross another union's picket line or to handle "unfair goods", or goods which have crossed or are destined to cross such picket lines.

This right of union members to refuse to cross another union's picket line is, of course, not as important as their right to refuse to cross their own picket line. In the latter case there is self-interest which justifies "concerted activ-

ities" which would otherwise be illegal. This right to refuse to cross another union's picket line has been a potent weapon in Labor's fight for the gains it has made, and no true friend of Labor wishes to see this weapon weakened.

But this right to refuse to cross another union's picket line is not one of the basic, vital interests of Labor, such as the right of workers to self-organization; their right to collective bargaining by representatives of their own choosing; their right to strike in support of their demand for higher wages and better hours and working conditions; and their right to engage in peaceful picketing to support a lawful strike.

Since the union conduct here does not involve the right to strike, it would seem that section 13 does not protect such conduct; and since it does not involve the right to engage in peaceful picketing or any of the other vital rights of workers, it would seem not to be a "concerted activity" within the protection of section 7. At least, we have been able to find no Supreme Court decision holding that the right to refuse to cross another union's picket line is a "concerted activity" protected by section 7.

It appears that the right of union employees to refuse to cross another union's picket line is not a federally protected right but only a matter of contract and the employer and employee are free to contract as they wish about the matter. As we understand, it was so held in National Labor Relations Board v. Rockaway News Supply Co., 345 U.S. 71, 73 S.Ct. 519, 524, 97 L.Ed. 832, 31 A.L.R.2d 511. It was said:

> "In the section by which the Labor Management Relations Act prescribes certain practices of labor organizations which shall be deemed unfair, there is a proviso that nothing therein 'shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are

engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this act * * *.' This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved."

[8] But whatever may be the nature of this right not to cross another union's picket line, it is not beyond the reach of state power when it is employed for a purpose contrary to state law. Indeed, the more important right of picketing or to strike is not beyond state control when it is employed for purposes made unlawful by state law. International Union U. A. W. A. F of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 257, 69 S.Ct. 516, 93 L.Ed. 651, 664, and cases there cited; Local Union No. 10, etc. v. Graham, 345 U.S. 192, 63 S.Ct. 585, 97 L.Ed. 946; United Constr. Workers, etc. v. Laburnum Constr. Corp., supra; United Auto., A. & A., etc. v. Wisconsin Employment Relations Board, supra; Montgomery Ward & Co. v. Northern Pacific Term. Co., supra, 128 F.Supp. 506, 509.

[9] Nor was the union conduct here, in our opinion, an "unfair labor practice" under section 8(b) of the federal Act so as to be beyond state power. It must be borne in mind that in this conduct this union was not on a strike, not engaged in picketing, or in asserting any of the other basic rights of Labor. As stated, the conduct was only a refusal to cross another union's picket line which was being maintained to support a lawful strike by the other union.

As we have seen, subsection 8(b), making certain union conduct unlawful as "unfair labor practices", contains the proviso that "nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his

own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter".

Thus this subsection (defining union "unfair labor practices") excepts from such practices the kind of conduct here involved. That is, this proviso plainly says that the refusal of any person to cross another union's picket line (maintained to support a lawful strike) shall not be unlawful or an "unfair labor practice" under section 8(b). Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co., 8 Cir., 1954, 215 F.2d 126, 137.

To support appellants' claim that their conduct was unlawful and a "unfair labor practice" under section 8(b), they rely on these cases: Garner v. Teamsters, etc., Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228; Weber v. Anheuser-Busch, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546; General Drivers, etc., Union v. American Tobacco Co., 348 U.S. 978, 75 S.Ct. 569, 99 L.Ed. 762; Local Union No 25, etc. v. New York, New Haven & Hartford Railroad Co., 350 U.S. 155, 76 S.Ct. 227, 100 L.Ed. —.

In the Garner case the conduct consisted of picketing which violated state law and was an "unfair labor practice" under section 8(b) of the federal Act. It was held that the state could not enjoin such conduct. The principle of that case was that there could not be two parallel remedies, one federal and the other state, for the same conduct.

But that principle has been materially modified in the later case of United Automobile, A. & A., etc. v. Wisconsin Employment Relations Board, 351 U.S. 266, 74 S.Ct. 833, 100 L.Ed. —, which held that a state could, under its own labor legislation, enjoin picketing which was carried on in violation of state law but which was also an "unfair labor practice" under section 8(b) of the federal Act. That is, there might be two similar remedies one federal and one state, for the same conduct under the circumstances.

In each of the other three cases above cited, the Weber case, the American Tobacco case, the Hartford Railroad case, the conduct consisted of union picketing, which the bill or complaint of the moving party expressly alleged was a violation of both the state law and an "unfair labor practice" under section 8(b) of the federal Act. It was held that the state could not enjoin such conduct because it was controlled by the federal Act and was within the exclusive jurisdiction of the federal Board. In the Weber case, Mr. Justice Frankfurter said:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." 348 U.S. 481, 75 S.Ct. 488, 99 L.Ed. 558.

This language was later repeated and quoted in the Hartford Railroad case, 350 U.S. 155, 76 S.Ct. 227, 100 L.Ed. —; and it seems to us to be a statement of the principle underlying these three decisions.

All those cases differ decisively from the case before us. In each of them the conduct was picketing which was either an "unfair labor practice" prohibited by section 8(b) or a "concerted activity" protected by section 7. But in the case before us the conduct was a mere refusal to cross another union's picket line (maintained to support a lawful strike) which conduct, by the proviso of section 8(b), is expressly declared not to be an "unfair labor practice".

So, we conclude that the conduct here enjoined was neither protected as a "concerted activity" under sections 7 and 13 nor prohibited as an "unfair labor practice" under section 8(b). Moreover, it does not appear that the federal

Act affords any remedy for this conduct, or that the federal Board has any power to grant any relief to the shipper against these defaulting carriers and the unlawful conduct of appellants.

The decisions of the Supreme Court support the proposition that not only must it appear that Congress intended to withdraw the conduct in question from state power, but it must also appear that the federal Acts afford a remedy for injury caused by such conduct. The lack of a federal remedy has been emphasized as a reason for holding that the conduct in question was not withdrawn from state power.

In International Union, U. A. W. v. Wisconsin Employment Relations Board, supra, 336 U.S. 254, 69 S.Ct. 521, 93 L.Ed. 653, it was said:

> "There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned."

In the Garner case, supra, 346 U.S. 488, 74 S.Ct. 164, 98 L.Ed. 238, the Court said:

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the state or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. International Union, U. A. W. v. Wisconsin Employment Relations Board, 336 U.S. 245, 254, 69 S.Ct. 516, 521, 93 L.Ed. 651, [663]."

In United Constr. Workers v. Laburnum Constr. Corp., supra, a state court was allowed to furnish its remedy by way of damages for tortious conduct which was a union "unfair labor practice" under section 8(b). That is, the fact that there was a federal remedy by which the federal

Board could have stopped the conduct, did not prevent the state from affording its remedy by way of damages. In that case the Court said [347 U.S. 656, 74 S.Ct. 837]:

> "In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of property will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner case] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." 347 U.S. 665, 74 S.Ct. 838, 98 L.Ed. 1031, 1032.

So, it seems clear that the conduct here enjoined was not pre-empted by Congress and withdrawn from state power but that, since there was no federal remedy for such conduct, the state could afford its own remedy and the Chancery Court had jurisdiction of the subject matter of this suit.

[10] We think there is no merit in appellants' claim that the carriers' employees were exempted by their contract from the duty to render service at the picketed plants. This contract bound only the parties thereto. It did not affect the rights of third persons. Such a contract cannot excuse defendant carriers and their employees from performing their public duty of carriage. Memphis News Publishing Co. v. Southern Ry. Co., supra.

[11] Nor do we find any merit in appellants' claim that the injunction denied them their rights under the 13th Amendment. The injunction did not require appellants or any of the carriers' employees to work. Nor did it interfere with their right to strike. It merely restrained them, so long as they do work, from doing such work contrary to their public duty. Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., supra, 54 F. 743, 19 L.R.A. 396.

Nor is there any merit in their claim that such injunction violated their rights under the 14th Amendment. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; Local Union No. 10, etc. v. Graham, supra.

All of the assignments of error are overruled and the decree of the Chancery Court is affirmed. The cause is remanded to the court for further proceedings not inconsistent with this opinion. The costs are adjudged against appellants and the surety on their appeal bond.

HICKERSON and SHRIVER, JJ., concur.

APPENDIX B

Pertinent Statutory Provisions

29 U. S. C., Sec. 157. *Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Sec. 101, 61 Stat. 140."

29 U. S. C., Sec. 158(b)(4). *Unfair labor practices.*

"To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular

labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. * * *."

"* * * *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;"

29 U. S. C., Sec. 163. *Right to strike preserved.*

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations of qualifications on that right. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Section 101, 61 Stat. 151."

LABOR-MANAGEMENT RELATIONS ACT OF 1947, 61 Stat. 161, 162.

"Sec. 501(2). The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

"Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

49 U. S. C., §316(d). *Undue preferences or prejudices prohibited.*

"All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

49 U. S. C., §316(e). *Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.*

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by raiload and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers, affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima, or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however*, That nothing in this chapter shall empower the Commission

to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

49 U. S. C., §322(b). *Jurisdiction of district courts to restrain violations and enforce orders.*

"If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

Tennessee Code Annotated, Section 65-422. *Unjust practices and unsafe services prohibited.*

"No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which shall be unjust, unreasonable, unduly preferential or discriminatory, nor shall any public utility provide or maintain any service that is unsafe, improper, or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered

by said commission. [Acts 1919, ch. 49, §6; Shan. Supp., §3059a89; Code 1932, §5452.]"

Tennessee Code Annotated, Section 65-512. *Special rate, rebate or drawback by common carrier or public service company prohibited—Preference in furnishing cars or motive power unlawful—Unjust discrimination.*

"If any common carrier or public service company shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any services rendered in the transportation of any kind of property, or any person, or any service within this state than it charges, demands, collects, or receives from any other person for a like service in transportation or service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company, make any preference between the parties aforesaid, in furnishing cars or motive power or otherwise, such common carrier or other public service company shall be guilty of unjust discrimination, which is prohibited and declared unlawful. [Acts 1897, ch. 10, §15; Shan., §3059a40; mod. Code 1932, §5416.]"

Tennessee Code Annotated, Section 65-514. *Preferences are unlawful.*

"It shall be unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage. [Acts 1897, ch. 10, §17; Shan., §3059a42; Code 1932, §5418.]"

Tennessee Code Annotated, Section 65-1523. *Injunction to compel compliance with law.*

"Said commission or the attorney-general, in the name of the state and acting upon the request of said commission, or any interested party in his or its own name, is given the power and right by bill of complaint in any chancery court having jurisdiction of the parties, to seek injunctive relief, prohibitory or mandatory, or both, to compel compliance by any offending parties with any of the provisions of this chapter, or with any order, decision, rule, regulation, direction, demand or requirement made by said commission in pursuance of this chapter; and jurisdiction and power are conferred and duty is imposed upon the several chancery courts, in all proper cases, to declare, decree and award such injunctive relief. [Acts 1933, ch. 119, §18; C. Supp. 1950, §5501.20 (Williams, §5501.18).]"

Tennessee Code Annotated, Section 65-1524. *Violation of chapter—Penalty.*

"Every officer, agent or employee of any corporation, or any other person who willfully and deliberately violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this chapter, shall be guilty of a misdemeanor, and upon conviction thereof for the first offense shall be punished by a fine of twenty-five dollars ($25.00); for the second offense shall be punished by a fine of fifty dollars ($50.00); and for the third offense be punished by a fine of one hundred dollars ($100) or by imprisonment for a period not exceeding one (1) year, or both, in the discretion of the court. Each day any such provision is violated shall constitute a separate offense.

"Every officer, agent or employee of any corporation and every other person who fails to obey, observe or comply with any order, decision, rule, regulation,

direction, demand or requirement of said commission made in pursuance of the power and authority conferred by this chapter, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars ($500), or by imprisonment for not exceeding one (1) year, or both, in the discretion of the court. Each day any such order, decision, rule or regulation, etc., of said commission is violated, shall constitute a separate offense; and the fact that there may have been a prosecution for the violation of any such order, decision, rule or regulation, etc., of said commission under this section, shall not operate to prevent or limit the exercise of the authority of the commission to suspend, revoke, alter or amend certificates of convenience and necessity, interstate permits, and/or contract hauler's permits as provided in this chapter. [Acts 1933, ch. 119, §17; C. Supp. 1950, §5501.19 (Williams, §5501.17).]"

Tennessee Code Annotated, Section 69-101. *Trusts and combinations lessening competition or controlling prices unlawful and void.*

"All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void. [Acts 1891, ch. 218, §1; 1903, ch. 140, §1; Shan., §3185; Code 1932, §5880.]"

APPENDIX C

DECREE OF JANUARY 12, 1953 M. B. 61 p. 256

KERRIGAN IRON WORKS, INC.,

v.

COOK TRUCK LINES, INC., *et al.*

IN PART II OF THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE. RULE NO. 72524

D E C R E E

This cause came on to be heard before the Honorable Chancellor William J. Wade on this January 12, 1953 and former days of the term on the pleadings and exhibits heretofore filed, including the plea in abatement filed by the defendants Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, et al, and especially on the motion of the complainant for a temporary injunction as prayed for in the original bill.

Upon consideration of all of which, and after briefs and argument of counsel, the court is of the opinion that said injunction should issue, and it is accordingly ordered, adjudged and decreed that upon execution by the complainant of an injunction bond in the amount of $500.00 as required by law, the Clerk and Master is ordered and directed to issue a temporary injunction enjoining the defendants and each of them, their officers, agents, em-

ployees, members, associates and confederates, individually or in any combination:

1. From failing or refusing, while exercising the duties and privileges of a common carrier, to provide customary carrier service to complainant under the legally established rates and rules applicable to such service and in accordance with the customary manner in which such carrier service was provided prior to March 17, 1952; that is, from failing or refusing to accept, handle, transport and deliver freight which the complainant or its agents tenders to the defendants Cook or Hoover, respectively, and from failing or refusing to accept, handle, transport or deliver to complainant freight tendered to said respective defendants for transport to complainant.

2. From coercing or inducing by threats or otherwise the defendant Cook Truck Lines, Inc., or the defendant Hoover Motor Express Co., Inc., or their employees, or any other common carrier or its employees, to fail or refuse or cease to furnish carrier service to or from complainant or its places of business; and from hindering or interfering in any manner with the rendition of carrier service to or from complainant or its places of business.

3. From coercing or inducing by threats or otherwise the defendant Cook Truck Lines, Inc., of the defendant Hoover Motor Express Co., Inc., or their employees, or any other common carrier or its employees, to refuse to make or to breach or fail to perform any lawful contract between complainant and such carrier, or between any

such carrier and any shipper of freight directed to complainant or its places of business.

And the court, after due consideration, being of the opinion that any contractual provisions existing between the cross complainant Hoover Motor Express Co., Inc. and the cross defendant Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, which prevent said cross complainant from carrying out its legal obligation to serve the complainant are legally ineffective for such purpose, the application of cross complainant Hoover Motor Express Co., Inc. for a temporary injunction against the cross defendant Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, is likewise granted, and it is ordered that upon execution by said cross complainant of an injunction bond in the sum of $500.00 as required by law the Clerk and Master will issue a temporary injunction enjoining said cross defendant Teamsters, Chauffeurs, Helpers, and Taxicab Drivers, Local Union No. 327, its agents, servants and employees, individually or in concert, from in any manner interfering with the activities of Hoover Motor Express Co. Inc., in requiring its employees to serve the public, including complainant, indiscriminately.

To the foregoing action of the court in granting the relief prayed in the original bill against the defendants Cook Truck Lines, Inc., and Hoover Motor Express Co., Inc., said defendants except. To the foregoing action of the court in granting the relief prayed for in the original

bill and the relief prayed for in the cross bill against the defendant Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, said defendant excepts.

BASS, BERRY & SIMS
Solicitors for complainant

M. E. DERRYBERRY, III

JUDSON HARWOOD
Solr. for Def. Hoover

DECREE OF MAY 31, 1953, M.B. 62 P 36

KERRIGAN IRON WORKS., INC.,

v. RULE NO. 72524

COOK TRUCK LINES, INC., *et al.*

IN PART II, OF THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

D E C R EE

This cause came on to be heard before the Honorable William J. Wade, Chancellor, on the 8th day of May, 1953, on motion of defendants, Oscar Jett, et al, to dispose of their plea in abatement heretofore filed to the amended and supplemental bill in this cause.

Upon consideration of which, it is ORDERED, ADJUDGED AND DECREED that said plea in abatement be, and same is, hereby overruled. Said defendants, Oscar Jett, et al, are granted thirty (30) days within which to answer.

To the foregoing action of the Court in overruling said plea in abatement, the defendants filing same respectively except.

J. O. BASS
Attorney for Complainant

THOS. L. CUMMINGS

M. E. DERRYBERRY, III
Attorney for Defendants

DECREE OF JUNE 28, 1955 M.B. 62 P 120

KERRIGAN IRON WORKS, INC.

v. RULE NO. 72524

COOK MOTOR TRUCK LINES, INC. AND HOOVER MOTOR EXPRESS CO., INC., AND TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS, LOCAL UNION NO. 327 AND DON VESTAL, ED SMITH, BROWN MOORE AND ROBERT BELL, *et al*

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE.

DECREE

This cause came on to be heard on this 28th day of June and prior days of the term, upon the entire record including the pleadings and proof and also upon the motion of the Defendant Local Union No. 327, to dissolve the injunction heretofore issued and dismiss the suit upon the ground that this Court does not have jurisdiction of the subject matter involved, briefs and argument of Counsel. Upon due consideration the Court is of the opinion that it has jurisdiction of the subject matter involved, and said motion to dissolve and dismiss is denied. The Court further finds that the averments of the Original Bill insofar as the prayer for injunctive relief is concerned are in all respects sustained by the proof.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the temporary injunction heretofore issued in this cause under the Original Bill, Amended Bill and Cross Bill of Hoover Motor Express Co., Inc. be and the same is hereby made permanent.

The cause is referred to the Clerk and Master who will, from the proof on file and from such additional proof as may be adduced by the parties, determine and report to the Court what, if any, damages the Complainant is entitled to under the 5th prayer of the original Bill for relief against the Defendants, Cook Motor Truck Lines, Inc. and Hoover Motor Express Co., Inc., by reason of these Defendant's failure to carry out their duties as common carriers and render common carrier service to the Complainant's business. Until the incoming of the report all other matters are reserved.

To all of the Court's action in this and former decrees adverse to it the Defendants, Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, Don Vestal, Ed Smith, Brown Moore and Robert Bell except and pray a broad appeal to the next term of the Court of Appeals sitting at Nashville, which prayer is granted by the Court upon their executing proper appeal bonds and otherwise perfecting their appeals as required by law and they are granted thirty (30) days within which to do so.

Pending disposition of the appeal the injunction heretofore issued is continued in effect.

Let the costs of the cause be divided into twenty-three (23) equal parts with one part being adjudged against each of the twenty-two (22) motor carrier defendants and

one part be adjudged against the Defendant, Local Union No. 327, for all of which costs, execution may, if necessary, issue.

BASS, BERRY & SIMS
Solicitors for Complainant

STOKES & TRIMBLE

CHARLES HUDSON

JUDSON HARWOOD

KING & FUSTON

CATE & CATE, ATTYS.

WALLER, DAVIS & LANSDEN

HOWARD, DAVID, BOULT & HART
Solicitors for Defendants

COURT OF APPEALS OF TENNESSEE

Middle Division

Minute Book 13, Page 999

KERRIGAN IRON WORKS, INC.,

v.

COOK TRUCK LINES, INC., *et al.*,

Davidson Equity.

Affirmed and Remanded.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that this cause be remanded to the Chancery Court of Davidson County for further proceedings in accordance with the Court's opinion, a certified copy of which will accompany the procedendo on the remand; and for the collection of the cost of the Court below, for all of which let procedendo issue.

The cost of this appeal will be paid by Teamsters, Chauffeurs, Helpers, and Taxicab Drivers, Local Union No. 327, Don Vestal, Ed Smith, Brown Moore, and Robert Bell, principals; Moss Bonding Company, surety; for all of which let execution issue. 6/29/56

SUPREME COURT OF TENNESSEE

Minute Book 44, page 848.

IN THE FOLLOWING CASES, THE COURT IS PLEASE TO DENY THE PETITION FOR CERTIORARI:

* * * * *

Kerrigan Iron Works v. Cook Truck Lines, Inc. et al, Davidson Equity.

* * * * *

12/7/56

APPENDIX D

PLEA IN ABATEMENT FILED DECEMBER 17, 1952

KERRIGAN IRON WORKS, INC.,
Complainant,

v.

COOK TRUCK LINES, INC., and HOOVER MOTOR EXPRESS CO., INC., and TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS, LOCAL UNION NO. 327, and DON VESTAL, ED SMITH, BROWN MOORE and ROBERT BELL,
Defendants.

IN THE CHANCERY COURT OF DAVIDSON COUNTY AT NASHVILLE, TENNESSEE

RULE NO. 72524

PLEA IN ABATEMENT

Come the defendants, Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, and Don Vestal, Ed Smith, Brown Moore and Robert Bell, and for plea in abatement to the original bill in this cause, and the cross-bill of the defendant Hoover Motor Express Company, say:

That the subject matter of the suit as set out in the original bill in this cause and in the cross-bill of the defendant Hoover Motor Express Co., Inc. is within the exclusive jurisdiction of the National Labor Relations Board, and the legality or illegality of the alleged conduct of the defendants and employees of the defendant carriers, against which injunction is sought by the complainant and cross-complainant, is governed by the National Labor Rela-

tions Act, as amended by the Labor Management Relations Act of 1947, and especially section 7 and section 8(b)(4)(A) and (D) of that Act, which sections provide as follows:

> Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object there of is:
>
> (a) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of another producer, processor, or manufacturer, or to cease doing business with any other person; * * *
>
> (d) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such

employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Although the bill and cross-bill do not in terms refer to the above statutes, it is clear that they attempt to allege a violation of the above statutory prohibitions, which if proven, would constitute an "unfair labor practice" under the above sections of the Act. The bill and cross-bill aver that the acts complained of constitute an interference with interstate commerce. These matters are within the exclusive jurisdiction of the National Labor Relations Board and before injunctive relief may be granted there must be a determination by the said Board that an "unfair labor practice" has been committed. Congress having acted in this field, and having set up an administrative agency to deal with such fact situations where they impinge upon interstate commerce, that remedy, so provided, is exclusive and there is no jurisdiction in any other tribunal to deal with such cases by injunctive process. It is the position of these above named defendants that the Court has no jurisdiction to grant the relief prayed.

Wherefore, the defendants pray the judgment of the Court upon this plea and that the bill and cross-bill in this

cause be abated and dismissed at the cost of the complainant and cross-complainant.

THOS. L. CUMMINGS

M. E. DERRYBERRY, III

Solicitors for Defendants Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, Don Vestal, Ed Smith, Brown Moore and Robert Bell.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Thomas L. Cummings, Solicitor for the above named defendants, makes oath that the above plea in abatement is true in substance and fact.

THOS. L. CUMMINGS

Sworn to and subscribed before me
this 16th day of December, 1952

L. B. WILLIAMS
Notary Public

My commission expires: January 15, 1956.

(SEAL)

ANSWER OF TEAMSTERS, ETC. ET AL., TO ORIGINAL BILL FILED JAN. 30, 1953

(Par. I through VII, pp. 41-44, are not reprinted.)

VIII

Further answering, defendants aver that the notices of refusal to transport given to complainant by defendants Cook and Hoover as alleged in Paragraph Four of the complaint, constituted and do constitute lawful and proper embargoes against complainant and that if complainant has any reasons to complain thereof, such reasons should be submitted to the Interstate Commerce Commission and/or to the Railroad and Public Utility Commission of the State of Tennessee, which said agencies have sole and exclusive jurisdiction to initially determine the validity and effect of embargoes issued pursuant to the statutes which they regulate.

IX

Defendants further aver that the members of the defendant Union have exercised the right vested in them by virtue of the provisions of the contracts referred to in the complaint, namely, their right to cross the picket line.

X

Defendants further aver that they will not interfere with and have never intended to interfere with any person who comes to the places of business of Cook and Hoover to remove therefrom any freight destined for complainant.

XI

Further answering, defendants aver that the relief sought by complainant is in conflict with, contravention of, violation of, and derogation of the Labor Management Relations Act, 1947, and specifically Section 7, the proviso clause of Section 8(b) and (4), and Section 13 thereof.

XII

The relief sought by complainant, if granted, will cause the defendant employers to violate Section 8(a)(1) of the Labor Management Relations Act, 1947, in that complainant seeks to compel the defendants, Cook Truck Lines, Inc. and Hoover Motor Express Company, Inc., to interfere with, restrain, and coerce their employees in the exercise of the rights guaranteed in Section 7 of said Act.

XIII

The relief sought by complaint, if granted, will cause or require the said defendant employers to violate those certain valid and existing contracts between each of said defendant employers and the defendant Union effective for the period February 1, 1952 to January 31, 1944, and specifically Article IX thereof, which provides as follows:

> "Article IX. It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or
>
> "Protection of Rights employees refuse to go through the picket line of a union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The term 'unfair goods' as used in this Article includes,

but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier whether party to this Agreement or not, at whose terminal or terminals or place or places of business there is a controversy between such carrier or its employees on the one hand, and a Labor Union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled. The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

XIV

The relief sought by complainant, if granted, will cause or require the defendant employers to violate similar provisions to those set forth immediately hereinabove as contained in the city pick-up and delivery contracts between Cook and Hoover and the Union.

XV

The relief sought by complainant will, if granted, deprive defendant Union and its members who are employees of the defendant employers of their rights, privileges and immunities guaranteed to them by the 13th Amendment to the Constitution of the United States, to-wit, the guarantee against involuntary servitude.

XVI

The relief sought by complainant will, if granted, deprive defendant Union and its members of rights, privi-

leges and immunities guaranteed to them by the 14th Amendment to the Constitution of the United States—to-wit, the rights of freedom of speech and freedom of assembly.

XVII

To the extent that the relief sought by complainant is predicated upon legislative enactments of the State of Tennessee and of the Congress of the United States, and particularly Paragraphs 5416, 5418, 5880 and 7811 of the Code of Tennessee, as well as Title 49 USCA Par. 3(1), the said complaint is without merit and without equity, in that said legislative provisions as sought to be applied in this case are in conflict with, derogation of, contravention of, and violation of the Labor Management Relations Act, 1947, for that Section 7, the proviso clause of Section 8(b)(4), and Section 13 of said Labor Management Relations Act, 1947, protect defendant Union and its members, and those acting in concert with them, against transgression of the exercise of their rights to refuse to cross a picket line and to otherwise concertedly support bona-fide concerted activities of other workers. As sought to be applied in this case, said legislative provisions as cited or relied upon by complainant are in direct conflict with the said Federal legislation on the one hand, and superior specific Federal legislation on the other, and are thus null and void as applied in this case.

XVIII

Defendants further aver that their only concerted activity with respect to the matters and things herein involved has been the refusal of the members of defendant Union to cross the picket line of a union. Defendants are informed and believe and allege on information and belief that the picket line at the premises of the complainant's plants is being properly conducted and is for the purpose of correcting alleged unfair labor practices on the part of complainant.

XIX

Defendants further aver that defendant Union has a bona-fide labor dispute with complainant, and that members of defendant Union came out on strike against complainant at or about the same time that the strike was started against complainant by the International Association of Bridge, Structural and Ornamental Ironworkers of America. Defendant Union has been engaged in and is engaged in directly picketing complainant for the purposes of obtaining for its members better wages, hours and working conditions in the course of their employment with complainant.

Every allegation and averment of the bill not hereinabove specifically admitted, explained or denied, or neither admitted nor denied, is hereby denied as fully as though

specifically denied herein. And now, having fully answered, these defendants pray to be hence dismissed with their costs.

THOMAS L. CUMMINGS

M. E. DERRYBERRY, III
Solicitors for Defendants

PLEA IN ABATEMENT OF OSCAR JETT, ET AL., FILED MARCH 31, 1953 IN THE CHANCERY COURT AT NASHVILLE, TENNESSEE, PART II

KERRIGAN IRON WORKS, INC.,
Complainant,

v.

COOK TRUCK LINES, INC., *et al.*,
Defendants.

Rule No. 72,524

PLEA IN ABATEMENT

Come the defendants, Oscar Jett, Wade Mangrum, P. G. Glass, Jim Hamentaller, Foust Jones, Thomas Russell, Jesse B. Goosetree, James Tapps, Charlie Forkum, Odis Barker, Robert Harberson, Clay Burns, Cordell Hunter, Lloyd Holt, James Baskin, R. E. Edney, Perry Canady, Howard Vernon, Frank Burns, and Robert L. Montgomery, Named defendants in the Amended and Supplemental Bill filed in this cause, and both individually and as members and representatives of defendant Local 327, for plea in abatement to the original bill and to the amended and supplemental bill filed in this cause, say:

I.

That the subject matter of the suit as set out in the original bill and in the amended and supplemental bill in this cause, and in the cross-bill of the defendant Hoover Motor Express is within the exclusive jurisdiction of the National Labor Relations Board, and the legality or ille-

gality of the alleged conduct of the defendants and employees of the defendant carriers, against which injunction is sought by the complainant, is governed by the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, and especially section 7 and section 8(b)(4)(a) and (d) of that Act.

II.

That the notices of refusal to transport given to complainant by the defendants Cook and Hoover as alleged in the complaint constitute lawful and proper embargoes against complainant, and if complainant has any reasons to complain thereof, such reasons should be submitted to the Interstate Commerce Commission and/or to the Railroad and Public Utilities Commission of the State of Tennessee, which said agencies have sole and exclusive jurisdiction to initially determine the validity and effect of embargoes issued pursuant to the statutes which they regulate.

Wherefore, the defendants pray the judgment of the Court upon this plea and that the original bill, the amended bill, and the cross-bill of the defendant Hoover Motor Express be abated and dismissed at the cost of the complainant and the cross-complainant.

THOS. L. CUMMINGS

M. E. DERRYBERRY, III

STATE OF TENNESSEE }
COUNTY OF DAVIDSON }

Thomas L. Cummings and M. E. Derryberry, III, Solicitors for the above-named defendants, make oath that the above plea in abatement is true in substance and fact.

THOS L. CUMMINGS

M. E. DERRYBERRY, III

Sworn to and subscribed before me
this 31st day of March, 1953.

L. B. WILLIAMS
Notary Public

My commission expires: January 15, 1956.

(Seal)

ANSWER OF OSCAR JETT, ET AL., FILED MARCH 31, 1953

KERRIGAN IRON WORKS, INC.,

v.

RULE NO. 72525, COOK TRUCK LINES, INC., *et al.*,

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE, PART II

ANSWER OF THE DEFENDANTS OSCAR JETT, ET AL., TO THE AMENDED AND SUPPLEMENTAL BILL.

Come the defendants Oscar Jett, Wade Mangrum, P. G. Glass, Jim Hamentaller, Foust Jones, Thomas Russell, Jesse B. Goosetree, James Tapps, Carlie Forkum, Odis Barker, Robert Harberson, Clay Burns, Cordell Hunter, Lloyd Holt, James Baskin, R. E. Edney, Perry Canady, Howard Vernon, Frank Burns, and Robert L. Montgomery, and for answer to so much and such parts of the original bill and the amended and supplemental bill filed in this cause, as they are advised it is necessary or proper for them to answer, answering both individually and as representatives and members of Local Union 327, say:

I.

The defendants adopt as a part of this answer all of the allegations, averments, denials and other statements contained in the answer of the defendant Local Union 327, Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Don

Vestal, Ed Smith, Brown Moore and Robert Bell, filed to the original bill in this cause, and the said answer is hereby incorporated herein by reference and made a part of this answer as fully as though specifically set out herein.

(Par. II through XVI and prayer, pp. 124-130, not reprinted.)

THOS. L. CUMMINGS
Solicitor for Defendants

M. E. DERRRYBERRY, III

KERRIGAN IRON WORKS, INC.

v. NO. 72524

COOK TRUCK LINES, *et al.*,

CHANCERY COURT PART II, HAMILTON COUNTY, TENNESSEE

MOTION TO DISSOLVE INJUNCTION

Come the defendants, Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union No. 327, and Don Vestal, Ed Smith, Brown Moore and Robert Bell, and move the Court to dissolve the injunction heretofore issued in this cause and to dismiss the suit on the following grounds and for the following reasons:

1. The defendants have exercised rights vested in them by the terms and provisions of the collective bargaining contract referred to in the original bill, in refusing to cross the picket line around complainant's plant, and in so far as the injunction in this cause interferes with the exercise of these vested rights in defendants, it should be dissolved.

2. The granting of the injunction in this cause is in conflict with, violation of, and derogation of the Labor Management Relations Act. 1947, and specifically Section 7 and the proviso clause of Section 8(b)(4) and Section 13 thereof.

3. That the Court did not have jurisdiction to grant the relief sought in this cause, for the reason that Congress has by the enactment of the Labor Management Relations

Act, 1947, granted exclusive jurisdiction to the National Labor Relations Board to deal with situations such as the one in the instant case, where the facts alleged reasonably bring the controversy within the statutory sections of the said Federal Act prohibiting these practices and where the conduct, if not prohibited by the Federal Act, may reasonably be deemed to come within the protection afforded by said Act, the State Court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues.

4. The injunction in this cause has forced the defendant employers to violate Section 8(a) of the Labor Management Relations Act, 1947 in that it compels said defendant employers to interfere with, restrain and coerce their employees in the exercise of the rights guaranteed in Section 7 of said Act.

5. The relief granted by injunction in this cause requires the defendant employers to violate those certain, valid and existing contracts between each of said defendant employers and the defendant Union and its members and specifically Article IX thereof, which provides as follows:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement."

6. The injunction granted in this cause requires the defendant employers to violate similar provisions to those

set forth immediately hereinabove as contained in the city pick-up and delivery contracts between defendant employers and the defendant Union and its members.

7. The injunction granted in this cause deprives the defendant Union and its members, who are employees of the defendant employers, of their rights, privileges and immunities guaranteed to them by the 13th Amendment to the Constitution of the United States to-wit, the guarantee against involuntary servitude.

8. The injunction granted in this cause deprives defendant Union and its members of rights, privileges and immunities guaranteed to them by the 14th amendment to the Constitution of the United States, to-wit, the rights of freedom of speech and of assembly.

WHEREFORE, the defendants move the Court to dissolve the injunction heretofore issued in this cause and dismiss the bill at complainant's cost.

KING & FUSTON

CHATTANOOGA, TENNESSEE
SOLICITORS FOR DEFENDANT.

COPY sent to Bass, Berry & Sims.
Compt. Sol.

M. E. DERRYBERRY, III

The foregoing federal questions were properly assigned as errors by appropriate assignments of error in the Tennessee Court of Appeals. See Record pp. 212-231 which, to avoid prolixity, we do not here reprint, inasmuch as it appears on the face of the Opinion of the Tennessee Court of Appeals that these matters were properly raised and considered. Cf. *supra*, pp. 30 ff. Note also that respondent, in opposing certiorari in the Tennessee Court of Appeals, acknowledged (Record, p. 28):

> "* * * it is the Petitioner's principal contention that the Courts of Tennessee are without jurisdiction over the subject matter involved in this controversy and * * * *that point has been fully briefed and argued before the Court of Appeals* * * *." (Emphasis added.)

The federal questions were preserved and asserted in petition for certiorari filed in the Supreme Court of Tennessee, record pp. 261-285. See particularly Assignment of Errors, record 271-272, and Question Presented, record p 274, excerpts from which appear above at p. 11 ff.

Supreme Court, U.S.
FILED
MAY 14 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 818.

TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS, LOCAL UNION No. 327, *et al.*,
Petitioners,

vs.

KERRIGAN IRON WORKS, INC., *et al.*,
Respondents.

BRIEF OF KERRIGAN IRON WORKS, INC., IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI.

WILSON SIMS,
1000 American Trust Building,
Nashville, Tennessee,
Counsel for Respondent, Kerrigan Iron Works, Inc.

BASS, BERRY & SIMS,
1000 American Trust Building,
Nashville, Tennessee,
Of Counsel.

E. L. MENDENHALL, INC., 1108 OAK STREET, KANSAS CITY 6, MO., HARRISON 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 818.

TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS, LOCAL UNION No. 327, *et al.*,
Petitioners,

vs.

KERRIGAN IRON WORKS, INC., *et al.*,
Respondents.

BRIEF OF KERRIGAN IRON WORKS, INC.

QUESTION PRESENTED.

Did Congress in enacting the National Labor Relations Act clearly intend to take away the right of a shipper to bring an action for damages, and injunctive relief in aid thereof, in a State Court against common freight carriers, and those acting in concert therewith including employees, upon failure and refusal of the car-

riers to obey their common law and statutory duties to serve any shipper who tenders the shipment and tariff rate applicable thereto, and vest exclusive regulation of the shipper's right against a defaulting carrier and its employees in the National Labor Relations Board?

The only segment of the above question which can be raised by the petitioning union is whether or not damages may be recovered against it and whether the injunctive relief decreed by the State Court against the carriers may be made applicable to members of the petitioning union who are employees of the carriers. To so much of the State Court decree as affects the carriers, no writ is sought by the carriers.

STATEMENT OF THE CASE.

The statement of the case as contained in the brief of the petitioner is accurate so far as factual averments, as distinguished from conclusions, are concerned. Succinctly stated, the facts are these:

Kerrigan is a shipper of intra and interstate merchandise. The common carriers involved are franchised to so act by the Public Service Commission of Tennessee and the Interstate Commerce Commission. The employees of Kerrigan were represented by the Iron Workers Union which was on strike maintaining a picket line. The carriers refused to serve Kerrigan because of the presence of the picket line, while, at the same time, they were serving Kerrigan's competitors at whose premises there was no picket line. Before the State Court, the issue was jurisdiction over the question of whether a common carrier and its employees may pick and choose among shippers whom to serve, and make a pact among themselves

not tc serve those shippers encumbered by disagreements with a labor organization.

The sole question presented to this Court by the instant petition is whether in a State Court suit for damages against common carriers and their employees under the above circumstances, the relief granted therein against the carriers, including incidental injunctive relief, may be made applicable to the employees of the defendant carriers.

ARGUMENT.

The principal insistence of the petitioners is that the judgment of the Tennessee courts is in direct conflict with this Court's opinion in *General Driver's, etc.*, v. *American Tobacco Co.*, 348 U. S. 978.

While there are aspects of this case which are similar to the American Tobacco Company case, the fundamental issues involved are not similar. The principal issue argued in the American Tobacco Company case was whether the picketing of American's premises was primary or secondary activity on the part of the union. American Tobacco Company had as its wholly-owned subsidiary corporation, the American Suppliers Company. These two companies, while separate corporations, were located on the same tract of land in Louisville, Kentucky, surrounded by one fence with common entrances. American Tobacco Company owned the land and the building wherein American Suppliers was located, and owned and operated the power plant which supplied facilities of both corporations. The two companies exchanged employees and had other interrelationships.

American Tobacco Company founded its suit for injunctive relief against defendants union's picketing upon the assertion that the picketing was secondary boycotting contrary to the public policy of the State of Kentucky.

This suit is one for damages against common carriers for breach of common law duties and duties prescribed by the statutes of the State of Tennessee. Instead of being similar to the American Tobacco case, it is similar to *Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656, and the character of the suit is not changed by the fact that in aid thereof, incidental injunctive relief is sought. The thrust of this action is against the carriers who have violated a fundamental duty to the public. The petitioning union is made a party as acting in concert with the carriers.

The injunctive relief and Kerrigan's right to such damages, as can be proven, has become final against the carriers. No aspect of that matter is now before the Court.

The argument of the petitioning union is that the judgment of the Tennessee courts should not be made applicable to it on two grounds:

(1) The proviso of Section 8(b)(4) of the Labor Management Relations Act protects the activity of the petitioning union and its employees in aiding the carriers to violate the law of Tennessee providing that common carriers must serve the public indiscriminately and without preference.

(2) The carriers and the petitioning union have made a pact among themselves providing that no employee of the carrier may be required to cross a picket line, and that this fact relieves the union member of the common carrier's duty to serve

the public indiscriminately and without preference.

First, as to the proviso in Section 8(b)(4) of the Labor Management Relations Act, no court has found that this is an umbrella of protection, which shields from any act other than an unfair labor practice charge.

> "All that this language says is that none of the definitions and prescriptions of unfair labor practices made applicable to a labor organization by subsection (b) of Sec. 8 of the Labor Management Relations Act is entitled to be taken to mean that the statute has in any way attempted to make it unlawful for any person to refuse to enter upon any struck premises of the category described in the proviso. Or, as stated in Report 105 of the Senate Committee on Labor and Public Welfare, 80th Congress, pp. 22-23, 'In other words, refusing to cross a picket line or otherwise refusing to engage in strike-breaking activities would not be deemed an unfair practice unless the strike is a wildcat strike by minority.' "
>
> *Minneapolis & St. L. Ry. Co.* v. *Pacific Gamble Robinson Co.*, 215 F. 2d 126, at p. 137.

Even the decision of the labor board cited in the brief of the petitioning union[1] contains the clear assertion that it is the belief of the labor board that "Congress intended the proviso to engraft an exception on 8(b)(4) applicable to union unfair labor practices * * *."

As to the second reason given by petitioning union for claiming protection, apparently under Sections 7 and 13 of the Labor Management Relations Act, a contract between the union and the carriers which excuses a union member from crossing the picket line and serving a shipper encumbered with labor disputes, is unsound. What is

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[1]*Cyril de Cordova, etc.*, 91 N. L. R. B. 1121, at 1137.

overlooked is that Kerrigan, a member of the public at large, is not a party to the contract between the union and the carrier. The duty of a common carrier is to serve the public indiscriminately and without preference, and is based upon public policy which had long existed at common law prior to the enactment of the Tennessee statutes. Those who choose to work for a common carrier are onerated with the same duties toward the public as are imposed upon the carrier itself.

> "Individuals and unions who accept employment in public enterprise must govern themselves accordingly, and recognize that their rights and duties are somewhat different from those of men engaged in purely private business."
>
> *Davenport Hotel Co., Inc.*, v. *Consolidated Freight Lines, Inc.*, 27 Wash. P. U. R. 15, affirmed.
>
> *Consolidated Freight Lines* v. *Dept. of Public Service*, (1939) 200 Wash. 609, 90 P. 2d 484.

See also: *In the Matter of Western Union Telegraph Co.*, (1949) 299 N. Y. 177, 86 N. E. 2d 162; *Burgess Brothers Co., Inc.*, v. *Stewart*, 112 Misc. 347, 184 N. Y. S. 199, 207, affirmed 194 App. Div. 913, 185 N. Y. S. 85; *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 54 Fed. 730; *Montgomery Ward Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475, 500; *Burlington Transportation Co.* v. *Hathaway*, (Iowa) 1943, 12 N. W. 2d 167.

It is fundamental that contracts made in opposition to legal duties are void. Neither a carrier nor its employees can excuse its failure to perform its public duty of carriage by a contract made with a third party or *inter sese*.

> *Memphis News* v. *Southern Railway Co.*, 110 Tenn. 684.
>
> *Loader* v. *Brooklyn Heights R. Co.*, 14 Misc. 208, 35 N. Y. S. 996.

The petitioning union further asserts that exclusive regulation of the subject matter herein is vested not only in the National Labor Relations Board, under the Labor Management Relations Act, but also in the Interstate Commerce Commission under the Interstate Commerce Act. In support of this assertion, four decisions of the Supreme Court of the United States are cited on page 21 of petitioner's brief, wherein this Court held that since the enactment of the Interstate Commerce Act, states have no authority to establish rates or tariffs applicable to common carriers engaged in interstate commerce. That situation is simply not before the court. In the first place, on page 2 of appellant's petition, appellant avers that jurisdiction is in this court because a state court in Tennessee has assumed and used power which was preempted from it upon the enactment of the Labor Management Relations Act. Under this section of appellant's petition, no averment is made that the power which the state court used had been taken from it by the enactment of the Interstate Commerce Act.

Further, the question, if valid at all, cannot be raised by the petitioning union, but could have been raised only by the carriers. Certainly the petitioning union may not say that the Interstate Commerce Act provides a remedy to Kerrigan against it. Whether the common carriers could have said that the Interstate Commerce Act provides Kerrigan with a remedy against them is not before the court.

Petitioning union's further point in this regard is that the procedures established by the Interstate Commerce Act for complaints of preference and discrimination are exclusive procedures and such a complaint can only be made before the Interstate Commerce Commission. However, the remedy there is not exclusive. While

49 U. S. C., Sec. 316(e), 322(b), provide power in the Interstate Commerce Commission and in the District Court to take jurisdiction of alleged perferences and discriminations of common carriers, Sec. 316(j) provides: "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith." Thus, without resort to the Interstate Commerce Commission, courts have over the years taken in hand the very subject matter involved herein.

Montgomery Ward v. *Northern Pacific Terminal*, 128 F. Supp. 475.

Minneapolis Railway Co. v. *Pacific Gamble Robinson Co., supra.*

Burlington Transportation Co. v. *Hathaway, supra.*

Davenport Hotel Co., Inc., v. *Consolidated Freight Lines, Inc., supra.*

Wherefore, respondent Kerrigan Iron Works, Inc., respectfully says that Congress by the enactment of the Labor Management Relations Act and the Interstate Commerce Act did not take from a shipper the right to sue a carrier who discriminates against him for damages in a state court, and in aid of such suit obtained injunctive relief against the carrier and its employees in violation of the carrier's public duty of carriage, and therefore prays that the writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I certify as attorney of record for the Respondent, Kerrigan Iron Works, Inc., in the above-styled and numbered cause in this court that I have this day had mailed by air mail, postage pre-paid, the following number of copies to the attorneys of record, at their said proper post-office addresses, true copies of the foregoing Brief in Opposition to the Granting of a Writ of Certiorari:

Two copies to L. N. D. Wells, Jr., 1610 National Bankers Life Building, Commerce at Ervay, Dallas 1, Texas; David Previant, 511 Warner Theatre Building, Milwaukee, Wisconsin; H. G. B. King and S. D. Fuston, 723 Chattanooga Bank Building, Chattanooga, Tennessee, Counsel for Petitioners; and one copy to Judson Harwood, Nashville Trust Building, Nashville, Tennessee, Attorney for Hoover Motor Express Company, Inc.; Charles Hudson, Jr., Broadway National Bank Building, Nashville, Tennessee, Attorney for Cook Truck Lines, Inc.; Waller, Davis & Lansden, 12th Floor, American Trust Building, Nashville 3, Tennessee, Attorneys for Super Service Motor Freight Co.; Stokes & Trimble, 537 Third National Bank Building, Nashville 3, Tennessee, Attorneys for Mohawk Motor Lines, Inc.; Cate & Cate, 510 Stahlman Building, Nashville 3, Tennessee, Attorneys for Johnson Freight Lines, Inc., Silver Fleet Motor Express, Inc., Wilson Truck Company; James C. Havron, Stahlman Building, Nashville 3, Tennessee, Attorney for Pulaski Highway Express, Inc.; Howard, Davis, Boult & Hunt, 7th Floor, American Trust Building, Nashville 3, Tennessee.

Dated May 13, 1957.

Wilson Sims

WILSON SIMS,
1000 American Trust Building,
Nashville, Tennessee,
Counsel for Respondent, Kerrigan Iron Works, Inc.

Decisions Per Curiam.

No. 818. TEAMSTERS, CHAUFFEURS, HELPERS & TAXICAB DRIVERS, LOCAL UNION No. 327, ET AL. *v.* KERRIGAN IRON WORKS, INC., ET AL. On petition for writ of certiorari to the Court of Appeals of Tennessee, Middle Division. *Per Curiam:* The petition for writ of certiorari is granted and the judgment of the Court of Appeals of Tennessee is reversed. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *General Drivers Union* v. *American Tobacco Co.*, 348 U. S. 978. *L. N. D. Wells, Jr., David*